IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SOFREGEN MEDICAL INC., a Delaware Corporation; and SOFREGEN MEDICAL IRELAND LIMITED, an Irish Private Limited Company,	)	
Plaintiffs/Counterclaim-Defendants,	)	
v.	)	
ALLERGAN SALES, LLC, a Delaware Limited Liability Company; and ALLERGAN PHARMACEUTICALS HOLDINGS (IRELAND), an Irish Incorporated Private Unlimited Liability Company,	)	C.A. No.: N20C-03-319 EMD CCLD
Defendants/Counterclaim-Plaintiffs.	)	

Submitted: December 6, 2022
Decided: February 3, 2023

Upon Defendant/Counterclaim-Plaintiffs' Motion for Summary Judgment as to Count II, Count III, Counterclaim I, Counterclaim II, and Counterclaim III,
DENIED

Brian M. Rostocki, Esquire, Benjamin P. Chapple, Esquire, Anne M. Steadman, Esquire, Reed Smith LLP, Wilmington, Delaware. *Attorneys for Defendants/Counterclaim-Plaintiffs Allergan Sales, LLC and Allergan Pharmaceuticals Holdings (Ireland).*

Thomas A. Uebler, Esquire, Kathleen A. Murphy, Esquire, Adam J. Waskie, McCollom D'Emilio Smith Uebler LLC, Wilmington, Delaware. *Attorneys for Plaintiffs/Counterclaim-Defendants Sofregen Medical Inc. and Sofregen Medical Ireland Limited*.

DAVIS, J.

I. INTRODUCTION

This is a breach of contract and fraudulent inducement action assigned to the Complex Commercial Litigation Division of this Court. In November 2016, Plaintiffs Sofregen Medical Inc. and Sofregen Medical Ireland Limited (collectively, "Sofregen") purchased from Allergan Sales, LLC and Allergan Pharmaceuticals Holdings (Ireland) (collectively, "Allergan") certain "silk biomaterial surgical mesh" ("SERI") products for use in reconstructive surgeries.[1] The purchase occurred via an asset purchase agreement (the "APA") between Sofregen and Allergan.[2] Sofregen conducted due diligence prior to the execution of the APA.[3] However, after the APA was executed, Sofregen allegedly discovered for the first time that Allergan omitted troubling, material clinical studies from the documents it shared with Sofregen.[4] Further, Sofregen discovered that some of the inventory allegedly covered by the APA was missing.[5] As a result, Sofregen filed this action on March 31, 2020.[6]

Sofregen filed a Second Amended Complaint on July 23, 2020, against Allergan for (1) breach of representations and warranties, (2) breach of contract, and (3) fraudulent inducement.[7] Allergan asserted counterclaims on May 3, 2021, for a declaratory judgment and two breaches of contract.[8] One counterclaim relates to Sofregen's alleged failure to consult with Allergan in related litigation, which was required by the APA.[9] Another relates to Sofregen's failure to pay Allergan its share of sale proceeds as required by the APA.[10] The final counterclaim is for a

[1] Second Amended Complaint ("Second Am. Compl.") ¶ 1. D.I. No. 20.
[2] *Id.*
[3] *See id.* ¶¶ 32-33.
[4] *Id.* ¶ 34.
[5] *Id.* ¶ 50.
[6] Original Complaint ("Compl."). D.I. No. 1.
[7] *See* Second Am. Compl.
[8] Defendants' Counterclaims ("Defs.' Countercls."). D.I. No. 46.
[9] *Id.* ¶¶ 109-15.
[10] *Id.* ¶¶ 116-22.

declaratory judgment.[11] Allergan now moves for summary judgment on Sofregen's remaining claims and Allergan's counterclaims (the "Motion").[12]

Previously, Allergan filed a motion to dismiss all three counts in the Second Amended Complaint.[13] The Court denied the motion.[14] Later, the parties stipulated to a dismissal of Count I (breach of representations and warranties).[15] Allergan's current Motion requests judgment in its favor on Sofregen's two remaining claims and Allergan's three counterclaims.[16]

The Court heard argument on the Motion on December 6, 2022. At the conclusion of the hearing, the Court took the Motion under advisement. For the reasons set forth below, the Motion is **DENIED**.

II. RELEVANT FACTS

A. THE PARTIES

Plaintiff Sofregen Medical Inc. is incorporated in Delaware and has its principal place of business in Medford, Massachusetts.[17] Sofregen Medical Inc. is "an early stage commercial biotechnology company focused on developing natural biomaterial medical products for medical aesthetics and reconstructive surgery."[18] At the time of filing this action, Sofregen Medical Inc. raised a total of around $22.3 million in funding.[19] Plaintiff Sofregen Medical Ireland Limited was "an Irish private limited company" when the APA closed in November 2016.[20]

[11] *Id.* ¶¶ 98-108.
[12] Defendants' Motion for Summary Judgment ("Defs.' Mot. for Summ. J."). D.I. No. 146.
[13] Defendants' Second Motion to Dismiss ("Defs.' Second Mot. to Dismiss"). D.I. No. 23.
[14] Opinion entered on Apr. 1, 2021. D.I. No. 38.
[15] Order entered on Sept. 6, 2022. D.I. No. 145.
[16] *See* Defs.' Mot. for Summ. J.
[17] Second Am. Compl. ¶ 10.
[18] *Id.*
[19] *Id.*
[20] *Id.* ¶ 11.

Defendant Allergan Sales, LLC is a Delaware limited liability company with revenues exceeding $16 billion in 2019.[21] Defendant Allergan Pharmaceuticals Holdings (Ireland) is an "Irish incorporated private unlimited liability company."[22]

B. THE PRODUCT: SERI SCAFFOLD TECHNOLOGY

It is helpful to have a short background on SERI in order to better understand the clinical studies that are a part of this dispute. SERI is a "naturally [silk] derived scaffold" for surgeons to use in procedures that require soft tissue support.[23] SERI was originally created in the mid-2000s, received FDA approval in 2009, and was acquired by Allergan in 2010.[24] SERI came to market in 2013, and by November 2016, it had been used in over 10,000 surgical procedures.[25]

Essentially, SERI is used as a scaffold for soft tissue repair and support. It acts as a reinforcement layer for soft tissue in plastic and reconstructive surgeries.[26] SERI is not FDA-approved for breast reconstruction, but the Second Amended Complaint alleges Allergan marketed, and some surgeons used, SERI for breast surgery.[27] The FDA became aware of these nonpermitted uses and issued a warning letter on May 29, 2015.[28] The warning letter advised Allergan that it needed FDA approval for breast surgery use.[29] After the warning letter, Allergan stopped promoting the sale of the product before Sofregen came on the scene.[30]

---

[21] *Id.* ¶ 12.
[22] *Id.* ¶ 13.
[23] *Id.* ¶ 17.
[24] *Id.*
[25] *Id.* ¶ 18.
[26] *Id.* ¶ 19.
[27] *Id.* ¶ 20.
[28] *Id.*; Defs.' Mot. for Summ. J., Ex. 17 (FDA Warning Letter).
[29] *See* Defs.' Mot. for Summ. J., Ex. 17.
[30] *Id.* at 8-9 ("Allergan made a commercial decision in Q4 2015 to cease marketing SERI given: (1) Allergan had projected that approximately 80% of its revenue would come from breast surgery applications; and (2) Allergan estimated it would cost approximately $30 million to conduct the studies necessary to ***potentially*** obtain FDA approval for breast surgery applications." (emphasis in original)).

C. CLINICAL STUDIES ON SERI: THE "SURE" STUDIES

On October 22, 2010, Allergan sponsored the first SURE study ("SURE-001").[31] SURE-001 was conducted in the United States.[32] The study's purpose was to "obtain clinical experience with the use of SERI . . . in breast reconstruction for soft-tissue support and repair."[33] The SURE-001 results were "promising" and "indicated that SERI was both safe and effective when used in breast reconstruction surgery."[34] For instance, the explant rate (the rate of removal of SERI from the body during a subsequent surgery) was less than 10%, and the explantations were attributable to the surgical procedures rather than SERI itself.[35] SURE-001 was completed on April 25, 2014.[36] Allergan finalized the SURE-001 report on December 24, 2014.[37] The SURE-001 report was uploaded to the shared data room between Sofregen and Allergan as part of Sofregen's due diligence.[38]

On June 21, 2011, Allergan began the SURE-002 study.[39] SURE-002 was conducted in Europe and was intended to "obtain clinical experience with the use of SERI for soft tissue support and repair in direct-to-implant (DTI) breast reconstruction."[40] The SURE-002 data was less promising than that of SURE-001. Specifically, of the explantations that occurred in SURE-002, 29.7% (11/37) were explanted due to SERI itself.[41] Despite the results of SURE-002,

[31] Plaintiffs' Answering Brief ("Pls.' Answering Br.") at 5, Oct. 14, 2022 (D.I. 158); *see also id.*, Ex. Ex. 9 at 1-2 (SURE-001 report).
[32] *Id.* at 5, Ex. 9 at 2.
[33] *Id.* at 5, Ex. 9 at 2.
[34] *Id.* at 5, Ex. 10 at Tr. 36:12-24 (deposition of Anh Hoang-Lindsay, Ph.D., Sofregen's Chief Scientific Officer). Dr. Hoang-Lindsay described the SURE-001 results as "great." *See id.*, Ex. 10 at Tr. 36:22.
[35] *Id.* at 5, Ex. 9 at 5, Ex. 11 at 8 (Expert Report of Jedediah Kaufman, M.D., expert for Sofregen).
[36] *Id.* at 6, Ex. 9 at 2.
[37] *Id.* at 6, Ex. 9 at 71.
[38] *Id.* at 17, Ex. 10 at Tr. 36.
[39] *Id.* at 7, Ex. 14 at 2 (SURE-002 report).
[40] *Id.* at 7, Ex. 14 at 2.
[41] *Id.*, Ex. 14 at 57, Ex. 11 at 11. Plaintiffs' Answering Brief states that SURE-002 "reflected an explantation rate of 40%"; however, the evidence Plaintiffs cite does not appear to show this. *See id.*

Allergan's report on the study concluded that SERI was safe and effective.[42] SURE-002 was completed on February 5, 2015.[43] However, Allergen did not finalize SURE-002 until December 7, 2016, which was a month after the APA was executed in November 2016.[44] It does not appear that the SURE-002 report was ever uploaded to the shared data room.[45]

On July 1, 2013, the SURE-006 study began in Israel to "obtain clinical experience with SERI . . . for soft tissue support and repair in breast reconstruction subjects with and without radiation therapy."[46] Fifteen subjects were enrolled in SURE-006, and five of those fifteen had SERI explanted.[47] Joseph Purpura, Allergan's Medical Device Safety Physician, stated in an email that SURE-006 was "stopped due to high SAE [serious adverse event] rates."[48] However, the report itself states that SURE-006 was halted for insufficient enrollment criteria.[49] Nevertheless, Allegen signed off on SURE-006 on September 16, 2016.[50] Like with the SURE-002 report, it does not appear that the SURE-006 report was ever uploaded to the shared data room.[51]

[42] *Id.* at 8, Ex. 14 at 65 ("The use of SERI in [SURE-002] provided an adequate and acceptable safety profile, a favorable risk-benefit ratio, breast mound stability for 2 years, and high levels of breast satisfaction by surgeons and subjects.").
[43] *Id.*, Ex. 14 at 2.
[44] Defs.' Mot. for Summ. J., Ex. 8 at 69.
[45] *See* Pls.' Answering Br. at 17 ("The data room established through Box.com contained a folder titled 'Clinical Studies' and the only clinical trial report ever uploaded was the SURE-001 [report]."). *See id.*, Ex. 10 at Tr. 36:3-37:5.
[46] *Id.*, Ex. 27 at 1-2 (SURE-006 report).
[47] *Id.*, Ex. 27 at 4-5. The report also notes that, of the explantations, the investigator did not consider these adverse events related "solely to SERI." *See id.*
[48] *Id.*, Ex. 28.
[49] *Id.*, Ex. 27 at 2.
[50] *Id.*, Ex. 27 at 47.
[51] *See id.* at 17 ("The data room established through Box.com contained a folder titled 'Clinical Studies' and the only clinical trial report ever uploaded was the SURE-001 [report]."). *See id.*, Ex. 10 at Tr. 36:3-37:5.

D. SOFREGEN CONDUCTS DUE DILIGENCE AND ACQUIRES SERI

In November 2015, Sofregen approached Allergan about acquiring the SERI business line. Shortly thereafter, Sofregen began conducting its due diligence.[52] Specifically, due diligence included a "combination of information Allergan shared in a data room, information requests from Sofregen, and in-person meetings at Allergan's Irvine, California offices."[53]

In December 2015, Allergan created a data room through Box.com.[54] On December 18, 2015, Allergan instructed its employees "with the most knowledge of SERI" to gather materials for due diligence and to share those materials in the data room.[55]

On February 2, 2016, corporate directors from Sofregen, including its CFO and CSO, attended an in-person meeting with corporate directors from Allergan at Allergan's Irvine, California location.[56] Before the meeting, Sofregen requested that the meeting cover "any recent clinical or animal studies (Allergan or non-Allergan)."[57] It does not appear that these studies, particularly SURE-002 and SURE-006, were covered at the February 2016 meeting.[58] Allergan says that Sofregen's request for clinical and animal studies was "not a request for documentation—it merely lists several talking points" for the meeting.[59] On February 29, 2016, Sofregen submitted a "preliminary non-binding proposal" to purchase SERI subject to due diligence completion.[60]

---

[52] *Id.* at 14, Ex. 36 at Tr. 45:4-49:5 (Weisman (former Sofregen CEO) deposition).
[53] *Id.* at 14-15, Ex. 37.
[54] *Id.* at 15, Ex. 37. The corporate business development lead from Allergan, Kevin Green, instructed in his email to "[t]hink about the types of things you would want to see if you were conducting diligence on this asset." *See id.*, Ex. 37. Sofregen takes this as one part of a larger scheme by Allergan to selectively upload data to the data room. *See id.* at 15. However, when the email is read as a whole, that does not appear to be the case. *See id.*, Ex. 37.
[55] *Id.* at 15.
[56] *Id.*
[57] *Id.* at 15, Ex. 41 (requesting items to be covered during the meeting).
[58] *See id.* at 16.
[59] Defendants' Reply Brief ("Defs.' Reply Br.") at 9-10. D.I. No. 169.
[60] Pls.' Answering Br. at 16, Ex. 42.

From February 2016 through July 2016, Sofregen, with the aid of various advisors, conducted due diligence on SERI and its potential permitted uses in breast reconstruction applications.[61] Sofregen focuses on Allergan's failure to explicitly provide the SURE-002 and SURE-006 clinical studies during this time period.[62] Allergan, for its part, concentrates on Sofregen's various legal and scientific advisors who should have been able to find the studies.[63] One notable fact during this time period is that Sofregen's Chief Scientific Officer, Anh Hoang-Lindsay, admitted in deposition testimony that Sofregen reviewed the MAUDE database during diligence, which disclosed to the FDA and the public numerous adverse events for SERI that were reported to the FDA.[64] However, Sofregen argues that the MAUDE database is insufficient to evaluate the safety and efficacy of SERI.[65]

On July 8, 2016, Dr. Hoang-Lindsay emailed Allergan seeking an updated due diligence list.[66] Included in the list was a request for Allergan "to provide information of any on-going sponsored clinical studies."[67] The SURE-002 and SURE-006 studies were not uploaded to the Box.com folder.[68]

---

[61] *See id.* at 16-19; Defs.' Mot. for Summ. J. at 10-12.
[62] *See* Pls.' Answering Br. at 16-19.
[63] *See* Defs.' Mot. for Summ. J. at 10-12.
[64] *Id.* at 12, Ex. 22 at Tr. 171:18-172:4. Additionally, this testimony confirms that "MAUDE" stands for "manufacturer and user facility device experience." *See id.*, Ex. 22 at Tr. 171:21-23.
[65] Pls.' Answering Br. at 19. This conclusion that the MAUDE database is insufficient for evaluation purposes comes from Sofregen's expert, Dr. Jedediah Kaufman, M.D. He states in his report that "[t]he MAUDE database is not useful when looking for clinical data regarding using a specific product for a specific surgical intervention," and that the database "in no way replaces true, data-driven scientific studies such as the SURE-002 clinical study report or the SURE-006 clinical study report." *Id.*, Ex. 11 at 22. Dr. Kaufman points to the MAUDE database homepage to support his conclusion. *See id.*, Ex. 11 at 22; *see also MAUDE – Manufacturer and User Facility Device Experience*, U.S. FOOD & DRUG ADMIN., www.accessdata fda.gov/scripts/cdrh/cfdocs/cfmaude/search.cfm (last visited Jan. 4, 2023).
[66] Pls.' Answering Br. at 17, Ex. 45.
[67] *Id.*, Ex. 45.
[68] *Id.* at 17.

On July 27, 2016, Sofregen representatives visited Allergan's office in Irvine, California.[69] Allergan representatives gave an oral presentation regarding SURE-001, SURE-002, and SURE-006.[70] Shortly after the meeting, Allergan's Director of Regulatory Affairs, John Smith, sent Ms. Hoang-Lindsay a spreadsheet of approximately 2,000 complaints and adverse events related to SERI.[71] Allergan derived the spreadsheet from the MAUDE database; the spreadsheet mentions SURE-002 but does not mention SURE-006.[72]

On November 10, 2016, Allergan and Sofregen executed the APA. Under Section 2.1(a) of the APA, Sofregen agreed to pay (1) an up-front payment of $3 million, (2) two potential milestone payments of $3 million, and (3) earn-outs equal to 5% of SERI's net sales for the first ten-years post-sale.[73] In return, Allergan was required under the APA to provide to Sofregen "all finished product inventory of [SERI]" as defined throughout various APA sections.[74] Additionally, the APA provided that Sofregen would assume liabilities "arising out of or relating to [SERI], arising after the Effective Date, whether relating to any [SERI] Product sold prior to, on or after the Effective Date."[75]

E. POST-CLOSING: SURE STUDIES SHARED WITH SOFREGEN

On December 12, 2016, Allergan's Director of Regulatory Affairs emailed another Allergan director and stated that "with the sale of SERI to Sofregen, some of the documents we need to deliver them include the clinical study reports . . . . Are you or someone else in your group handling this?"[76] On December 15, 2016, Ms. Hoang-Lindsay emailed Allergan's Project

[69] Defs.' Mot. for Summ. J. at 12-13; Pls.' Answering Br. at 17.
[70] Pls.' Answering Br. at 18, Ex. 49 (laying out the personal meeting notes of a Sofregen representative).
[71] Defs.' Mot. for Summ. J. at 13, Ex. 30 (listing the complaints and adverse events).
[72] Pls.' Answering Br. at 19; *see also* Defs.' Mot. for Summ. J., Ex. 30.
[73] *See* Defs.' Mot. for Summ. J., Ex. 37 § 2.1(a).
[74] *See id.*, Ex. 37 § 2.2(a)(iv); *see also id.*, Ex. 38 at 31 (listing the "finished product inventory").
[75] *Id.*, Ex. 37 § 2.3(a)(iii).
[76] *Id.*, Ex. 40; *see also* Pls.' Answering Br. at 21.

Manager, Brian Dunstan, to request that Allergan provide to Sofregen, *inter alia*, "[a]ll raw data for SERI AEs [adverse events]" and "[a]ll AE [adverse event] trend reports for SERI."[77] Finally, on December 22, 2016, Allergan provided to Sofregen the data requested and the SURE-002 and SURE-006 reports for the first time.[78]

On January 30, 2017, Ms. Hoang-Lindsay sent an email laying out Sofregen's specific concerns regarding the SURE-002 and SURE-006 studies.[79] On January 31, 2017, Ms. Hoang-Lindsay contacted a member of Allergan's "alliance management" with follow up questions regarding the December 22 disclosures.[80] In that email, Ms. Hoang-Lindsay stated that "[t]o be honest, [Sofregen is] a bit alarmed with the data and want a stronger understanding of the rationale behind patient enrollment and rationale behind study timeline decision (abrupt stops)."[81] The Court notes the record is unclear whether Allergan ever followed up on Ms. Hoang-Lindsay's request for explanation.[82]

F. THE MISSING SERI UNITS

On November 22, 2016, Allergan instructed its employees to return SERI products in their possession.[83] In November 2017, Sofregen contacted Allergan regarding 171 unaccounted for units of SERI that Sofregen believes were included in the initial inventory report from October 2016 but not accounted for post-closing.[84] By February 2018, Sofregen says the number of unaccounted for units decreased to 131.[85] Allergan, on the other hand, says the number of

[77] Defs.' Mot. for Summ. J. at 18, Ex. 39.
[78] *Id.* at 18-19, Ex. 40; Pls.' Answering Br. at 21, Ex. 59.
[79] Pls.' Answering Br., Ex 79.
[80] *Id.* at 21, Ex. 60.
[81] *Id.*, Ex. 60.
[82] *See id.*
[83] Defs.' Mot. for Summ. J. at 21.
[84] Pls.' Answering Br. at 22, Ex. 63.
[85] *Id.*, Ex. 65.

unaccounted for units was 88.[86] There appears to be a discrepancy regarding what Allergan was required to account for and turn over to Sofregen as it relates to SERI products.[87]

Section 2.2(a)(iv) of the APA governs the transfer of SERI units. It is titled "Transfer of Assets" and states:

> (a) "Acquired Assets" means all of [Allergan's] right, title and interest, as of the Effective Date, in and to [its] respective assets exclusively related to the Business and/or [SERI] Product, wherever located, including without limitation the following: . . . (iv) (A) all finished product inventory of [SERI], including the finished product inventory set forth on Schedule 2.2(a)(iv)(A) (such finished product inventory, the "Finished Product Inventory"), (B) all silk spools held for use solely to manufacture [SERI] set forth on Schedule 2.2(a)(iv)(B) (the "Spools"), and (C) the packaging materials used or held for use exclusively with respect to [SERI] set forth on Schedule 2.2(a)(iv)(C) (such packaging materials, together with the Finished Product Inventory and Spools, the "Product Inventory").[88]

Schedule 2.2(a)(iv)(A) lists 15,767 units of Finished Product Inventory in total.[89] Both parties agree this was the total Finished Product Inventory under the Schedule,[90] but they disagree over the number of unaccounted for units and the price of those missing units.[91]

G. SERI PRODUCT LIABILITY LAWSUITS

On November 28, 2016, a plaintiff filed a product liability lawsuit in Los Angeles Superior Court against Allergan and a physician who performed the procedure, and the case was later removed to the Central District of California (the "Knecht Action").[92] A second lawsuit was filed on March 24, 2020, which was also filed in Los Angeles Superior Court (the "Hasso

[86] *See* Defs.' Mot. for Summ. J. at 22, Ex. 51.
[87] *See id.*, Ex. 51. In the accounting of this Exhibit, it states that 88 units had "no record of use or return," and this, it seems, is where Allergan gets its number. *See id.* Sofregen gets its number from the "total" write-off and return of sales representatives' SERI units. *See id.*
[88] *Id.*, Ex. 37 § 2.2(a)(iv).
[89] *See id.*, Ex. 38 at 31 (showing a table of Finished Product Inventory as of November 7, 2016).
[90] *See id.* at 22; Pls.' Answering Br. at 44.
[91] *See* Defs.' Mot. for Summ. J. at 22, Ex. 51; Pls.' Answering Br. at 22, Ex. 65. Sofregen believes that, using Allergan's own pricing, the price of the missing units totals approximately $467,000. *See* Pls.' Answering Br. at 22, Ex. 66. Allergan disagrees with the damages calculation. *See* Defs.' Reply Br. at 20.
[92] Defs.' Mot. for Summ. J. at 19, Ex. 42.

Action").[93] A third action was filed on November 6, 2017, in the Philadelphia Court of Common Pleas against Allergan and Sofregen, and the case was later removed to the Eastern District of Pennsylvania (the "Harben Action").[94] Finally, a fourth action was filed on July 27, 2018, in the District of Massachusetts (the "Kristic Action").[95] Allergan has alleged a claim against Sofregen under APA Sections 2.3 and 5.7 in relation to Sofregen's conduct in the Harben Action.[96]

Section 2.3(a)(iii) of the APA is titled "Assumption of Liabilities," and it states:

> (a) As of the Effective Date, [Sofregen] shall assume and pay, discharge, perform or otherwise satisfy the following liabilities and obligations of every kind and nature, whether known or unknown, express or implied, primary or secondary, direct or indirect, absolute, accrued, contingent or otherwise and whether due or to become due, of [Allergan's] arising out of, relating to or otherwise in respect of the Acquired Assets and/or Business (the "Assumed Liabilities"): . . . (iii) subject to any applicable reimbursement obligations of [Allergan] in Section 5.7, (A) all liabilities and obligations for warranty claims, complaints and product liability, and the other liabilities assumed by [Sofregen] pursuant to Section 5.7, including all Actions relating to such liabilities, and (B) all liabilities and obligations for refunds, adjustments, allowances, repairs, exchanges, recalls and returns or similar claims, arising out of or relating to [SERI] Product, arising after the Effective Date, whether relating to any [SERI] Product sold prior to, on or after the Effective Date.[97]

Section 5.7(a)(ii) of the APA is titled "Product Responsibility," and it states in pertinent part:

> (a) From and after the Effective Date: . . . (ii) Without limiting the foregoing, (A) [Sofregen] shall promptly notify [Allergan] of any complaints, requests, investigations, reports or pending or threatened Actions with respect to any Previously Sold Product; (B) [Sofregen] shall regularly consult in advance with [Allergan] on all material actions to be taken relating to such complaints, requests, investigations, reports or Actions relating to any Previously Sold Product; (C) [Sofregen] shall in good faith incorporate into its response(s) to any such complaints, requests, investigations, reports or Actions any input of [Allergan] on such matters; and (D) [Allergan] shall be entitled to participate, at its cost, in any Action related thereto. [Sofregen] shall diligently conduct the defense of any such Action. . . . [Sofregen] shall be financially responsible for all such actions required

[93] *Id.* at 19-20, Ex. 43.
[94] *Id.* at 20, Ex. 44.
[95] *Id.* at 20, Ex. 45.
[96] *See* Defs.' Countercls. ¶¶ 109-15.
[97] Defs.' Mot. for Summ. J., Ex. 37 § 2.3(a)(iii).

> to be taken by it under this clause (ii); provided, that if (1) any such complaint, request or investigation shall result in an Action relating to Previously Sold Product, (2) [Sofregen] has complied with the foregoing terms of this Section 5.7(a)(ii), and (3) the final and non-appealable holding in such Action is that [Sofregen] is liable for damages resulting, in whole or in part, from Non-Conforming Product (or such a determination is made in any appealable holding or settlement, consented to by [Allergan], such consent not to be unreasonably withheld, conditioned or delayed), then [Allergan] shall be responsible for its *pro rata* share . . . of the reasonable out-of-pocket costs and expenses actually incurred by [Sofregen] in connection with such Action, including damages required to be paid by [Sofregen] relating thereto, but solely to the extent that such reasonable out-of-pocket costs and expenses and other Losses are attributable to the use, sale, manufacture or distribution of Non-Conforming Product.[98]

Allergan brought a counterclaim against Sofregen for breach of the above APA Sections because Allergan believes Sofregen failed to assume liabilities and obligations in connection to these lawsuits and specifically the Harben Action.[99] Namely, in the Harben Action, Sofregen filed a motion to dismiss, arguing it was not liable for the plaintiff's injuries.[100] Allergan maintains Sofregen breached the APA because Sofregen "did not consult with or solicit any input from Allergan at any point throughout the Harben Action."[101] Sofregen says it "regularly communicated [with Allergan] and Allergan instructed Sofregen to consent to remove the case to federal court."[102] Sofregen was ultimately dismissed from the Harben Action.[103]

H. SOFREGEN FAILS TO PAY EARN-OUT PAYMENTS

APA Section 2.8(b) involves "Earn-Out Payments."[104] Section 2.8(b) states that "[Sofregen] shall pay to [Allergan] earn-out payments equal to five percent (5%) of Net Sales of [SERI] Products sold directly or indirectly by [Sofregen and related parties] during the Earn-Out

[98] *Id.*, Ex. 37 § 5.7(a)(ii).
[99] *Id.* at 20.
[100] *See id.* at 20-21.
[101] *Id.* at 21.
[102] Pls.' Answering Br. at 24, Ex. 91 at Tr. 360:4-22.
[103] *Id.* at 24.
[104] *See* Defs.' Mot. for Summ. J., Ex. 37 § 2.8(b).

Term (the 'Earn-Out Payments') in accordance with Section 2.8(b)."[105] The APA defines "Earn-Out Term" as "the period commencing on the Effective Date and ending on the first to occur of (i) the 10th anniversary of the Effective Date; and (ii) the expiration of the last-to-expire patent covering SeriScaffold or SeriPliable."[106]

Sofregen failed to provide Earn-Out Reports and pay Earn-Out Payments after Q3 2017.[107] Allergan alleges that Sofregen's failure to pay from Q4 2017 to Q4 2018 entitles Allergan to at least $54,000 in damages, exclusive of interest.[108] Sofregen's failure to pay relates to its belief that Allergan breached the APA.[109]

I. PROCEDURAL POSTURE

On March 31, 2020, Sofregen filed this action against Allergan, alleging (1) breach of representations and warranties, (2) breach of the APA, and (3) fraudulent inducement.[110] On April 17, 2020, Sofregen filed its First Amended Complaint, alleging the same three counts.[111] On June 8, 2020, Allergan filed its First Motion to Dismiss the First Amended Complaint.[112] On July 23, 2020, Sofregen filed the current Second Amended Complaint, alleging the same three counts.[113] On September 3, 2020, Allergan filed its Motion to Dismiss the Second Amended Complaint,[114] which was denied.[115] Thereafter, on May 3, 2021, Allergan filed its Answer and

[105] *Id.* (underlining in original). Under Section 2.8(b)(ii), Earn-Out Payments for a specific quarter were due within sixty (60) days after the end of each quarter. *See id.*, Ex. 37 § 2.8(b)(ii).
[106] *Id.*, Ex. 37 § 1.1 (Definitions).
[107] *Id.* at 52, Ex. 74.
[108] *Id.* at 52.
[109] *See* Pls.' Answering Br. at 50.
[110] *See* Compl. ¶¶ 29-44.
[111] *See* First Amended Complaint. D.I. No. 5.
[112] Defs.' First Motion to Dismiss. D.I. No. 10.
[113] *See* Second Am. Compl. ¶¶ 56-73.
[114] Defs.' Second Mot. to Dismiss.
[115] *See* Order entered on Jan. 4, 2021 (denying the Motion as to Counts I and II); Opinion (denying the Motion as to Count III). D.I. No. 36.

Counterclaims, seeking (1) a declaratory judgment, and alleging (2) breach of the Sections 2.3 and 5.7 of the APA and (3) breach of Section 2.8 of the APA.[116]

On August 29, 2022, the parties submitted a Stipulation and Proposed Order dismissing Count I (breach of representations and warranties),[117] which the Court granted on September 6, 2022.[118] On September 6, 2022, Allergan filed the Motion, seeking judgment in its favor on Sofregen's two remaining Counts (breach of the APA and fraudulent inducement), as well as Allergan's three counterclaims. The Court heard argument on the Motion on December 6, 2022.

III. PARTIES' CONTENTIONS

Allergan moves for summary judgment on Sofregen's two remaining claims and Allergan's counterclaims. The two remaining Sofregen claims are Count II (breach of the APA) and Count III (fraudulent inducement).

On Count II (breach of the APA Sections 2.2 and 2.5), Allergan argues that Sofregen cannot show that "Allergan failed to transfer any Finished Product Inventory in [Allergan's] possession or control as of November 10, 2016."[119] Moreover, Allergan argues that Sofregen cannot show it has suffered any damages from any alleged breach of APA Sections 2.2 and 2.5.[120] Regarding Count III (fraudulent inducement), Allergan argues that the APA "expressly precludes" this claim despite the Court's ruling in its April 1, 2021 Opinion that "disclaiming reliance on representation and warranties outside the [asset] purchase agreement does not bar a claim for fraudulent *concealment* of material information."[121] Allergan also contends that (i) it

[116] *See* Defs.' Countercls. ¶¶ 98-122.
[117] Stipulation and Proposed Order entered on Aug. 29, 2022. D.I. No. 144.
[118] *See* Order entered on Sept. 6, 2022. D.I. No. 145.
[119] Defs.' Mot. for Summ. J. at 41.
[120] *Id.* at 44.
[121] *See id.* at 31; *see also* Opinion at 10 (emphasis in original) (internal quotation marks omitted).

did not conceal alleged material facts; (ii) it did not act with scienter; and (iii) Sofregen cannot establish that it justifiably relied on Allergan's representations or lack thereof.[122]

On Counterclaim I (declaratory relief), Allergan argues that pursuant to APA Sections 2.3 and 5.7:

> Sofregen assumed all liabilities and obligations relating to Previously Sold Products, and that Allergan is not responsible for reimbursing Sofregen for any damages or costs associated with warranty claims and product liability unless and until there is a final and non-appealable holding that Sofregen was liable for damages resulting, in whole or in part, from a Non-Conforming Product and, even then, only if Sofregen has satisfied the conditions precedent in [APA] Section 5.7(ii).[123]

With respect to Counterclaim II (breach of APA Sections 2.3 and 5.7), Allergan argues that Sofregen breached these APA Sections because Sofregen failed "to assume liability for and conduct the defense of" product liability lawsuits, and that Sofregen failed to consult Allergan "on all material actions taken in those lawsuits."[124] Finally, with respect to Counterclaim III (breach of APA Section 2.8), Allergan claims that Sofregen failed to pay Earn-Out Payments due to Allergan from Q4 2017 through the present.[125]

Sofregen asserts that Allergan is not entitled to summary judgment on Sofregen's claims or Allergan's counterclaims. On Count II, Sofregen provides that Allergan failed to transfer all Finished Product Inventory to Sofregen within 30 days of closing as required by the APA, and that Sofregen has suffered damages resulting from this breach.[126] Regarding Count III, Sofregen argues that genuine issues of material fact "warrant a trial on Sofregen's" claim.[127] Specifically, Sofregen contends that: (i) Allergan actively concealed material facts regarding SURE studies;

---

[122] *See* Defs.' Mot. for Summ. J. at 33-41.
[123] *Id.* at 45.
[124] *Id.* at 49.
[125] *See id.* at 51-52.
[126] *See* Pls.' Answering Br. at 43-46.
[127] *See id.* at 25.

(ii) Allergan knew it was concealing information or at least acted with reckless indifference; (iii) Allergan concealed negative SURE studies with the intent to induce Sofregen into the APA; (iv) Sofregen's reliance on the information disclosed during due diligence was justified; and (5) the APA does not preclude the fraudulent inducement claim.[128]

Sofregen claims that Allergan is not entitled to the declaratory relief in Counterclaim I because the APA is "not nearly as broad" as Allergan contends.[129] Sofregen argues that, with respect to Counterclaim II (breach of APA Sections 2.3 and 5.7), Allergan fails to produce evidence that Sofregen failed to consult with Allergan in the other lawsuits, and that any allegations Allergan has made are conclusory.[130] Finally, regarding Counterclaim III (breach of APA Section 2.8), Sofregen maintains that summary judgment is improper because Sofregen withheld Earn-Out Payments due to Allergan's alleged breaches of the APA and fraudulent inducement, meaning Sofregen therefore disputes whether it is required to pay the Earn-Out Payments.[131]

IV. STANDARD OF REVIEW

"The Court will grant summary judgment if, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law."[132] On a motion for summary judgment, the Court "(i) construes the record in the light most favorable to the non-moving party; (ii) detects, but does not decide, genuine issues of material fact; and (iii) denies the motion if a material fact is in

[128] *See id.* at 26-43.
[129] *See id.* at 47-48.
[130] *See id.* at 48-50.
[131] *See id.* at 50.
[132] *CVR Refin., LP v. XL Specialty Ins. Co.*, 2021 WL 5492671, at *8 (Del. Super. Nov. 23, 2021) (citing *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992)); Del. Super. Ct. Civ. R. 56.

dispute."[133] The moving party bears the initial burden of showing the motion is supported by the undisputed facts.[134] If the moving party carries its burden, then the burden shifts to the non-moving party to show a genuine issue of material fact exists, and that a trial is necessary.[135]

Although summary judgment is "encouraged when possible,"[136] there is no "right" to summary judgment.[137] "The Court may deny summary judgment if the Court is not reasonably certain" whether there is a triable fact issue.[138] The Court may also deny summary judgment if "the Court concludes a more thorough inquiry into, or development of, the facts[] would clarify the law or its application."[139]

V. DISCUSSION

A. COUNT III (FRAUDULENT INDUCEMENT)

1. The Fraudulent Inducement Claim

To establish a claim for fraudulent inducement, a party must prove:

> (1) a false representation of material fact; (2) the defendant's knowledge of or belief as to the falsity of the representation or the defendant's reckless indifference to the truth of the representation; (3) the defendant's intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance.[140]

Element (2) is often referred to as "scienter."[141]

---

[133] *CVR Refin., LP*, 2021 WL 5492671, at *8 (citing *Judah v. Del. Tr. Co.*, 378 A.2d 624, 632 (Del. 1977); *Merrill*, 606 A.2d at 99; *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962)).
[134] *Id.* (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).
[135] *Id.* (citing *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995)).
[136] *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005).
[137] *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002) (internal quotation marks and citation omitted).
[138] *CVR Refin., LP*, 2021 WL 5492671, at *8 (citing *Cross v. Hair*, 258 A.2d 277, 278 (Del. 1969)).
[139] *Id.* (citing *Alexander Indus., Inc. v. Hill*, 211 A.2d 917, 918-19 (Del. 1965)).
[140] *Chapter 7 Tr. Constantino Flores v. Strauss Water Ltd.*, 2016 WL 5243950, at *7 n.34 (Del. Ch. Sept. 22, 2016) (internal quotation marks omitted) (citing *Duffield Assocs., Inc. v. Meridian Architects & Eng'rs, LLC*, 2010 WL 2802409, at *4 (Del. Super. July 12, 2010)).
[141] *See ITW Glob. Invs. Inc. v. Am. Indus. P'rs Cap. Fund IV, L.P.*, 2017 WL 1040711, at *6 (Del. Super. Mar. 6, 2017).

Allergan argues: (a) it did not conceal material facts; (b) it did not act with scienter; and (c) Sofregen cannot establish justifiable reliance. Sofregen argues: (a) Allergan intentionally hid harmful SERI studies and remained silent in the face of a duty to disclose the studies; (b) Allergan acted with at least reckless indifference; (c) Allergan concealed with the intent to induce Sofregen into the APA; and (d) Sofregen justifiably relied on Allergan's due diligence disclosures.

Regarding element one, Allergan has failed to carry its burden. "Generally, there is no duty to disclose a material fact or opinion, unless the defendant has a duty to speak. However, where one *actively* conceals a material fact, such person is liable for damages caused by the conduct."[142] The Court finds that there is no dispute that Allergan failed to provide the negative SURE-002 and SURE-006 study reports to Sofregen until *after* the APA was executed, despite Allergan having those study reports in its possession *before* the APA was executed. Specifically, the APA was executed on November 10, 2016.[143] Allergan, for the first time, provided the actual SURE-002 and SURE-006 study reports to Sofregen representatives on December 22, 2016.[144] The SURE-002 study was completed on February 5, 2015.[145] The SURE-006 study was signed off on September 16, 2016.[146] Thus, Allergan had the negative studies in its possession before the execution of the APA, and it did not share those study reports until after the execution of the APA. Moreover, Allergan wrote in the SURE-002 study report that SERI was safe and effective, despite the 29.7% explantation rate.[147] Allergan also wrote in the SURE-006 study report that it was halted for insufficient enrollment data,[148] despite an internal email from Allergan's Medical

[142] *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987) (emphasis in original).
[143] *See* Defs.' Mot. for Summ. J., Ex. 37.
[144] *Id.* at 18-19, Ex. 40; Pls.' Answering Br. at 21, Ex. 59.
[145] Pls.' Answering Br., Ex. 14 at 2.
[146] *Id.*, Ex. 27 at 47.
[147] *Id.* at 8, Ex. 14 at 65; *see also id.*, Ex. 14 at 57, Ex. 11 at 11.
[148] *Id.*, Ex. 27 at 2.

Device Safety Physician, which stated the SURE-006 study was halted due to high serious adverse event rates.[149]

Allergan's arguments that the data was available on the MAUDE database,[150] and that a list of 2,000 complaints related to SERI products was sent to Sofregen,[151] does not carry Allergan's burden on summary judgment. Moreover, the fact that SERI studies were brought up in the July 27, 2016, meeting between Allergan and Sofregen corporate representatives[152] is equally unavailing for Allergan. Viewing the facts in the light most favorable to Sofregen, Allergan has failed to show that it did not make a false representation or omission of fact. There is a factual question as to whether Allegan "actively concealed" these material facts. For this reason, alone, Allergan's Motion on Count III is **DENIED**. For purposes of completeness, the Court discusses the remaining elements below.

Allergan has failed to carry its burden on the second element. "[K]nowledge may be pled generally, [but] when a plaintiff pleads a claim of fraud that charges that the defendants knew something, [the plaintiff] must allege sufficient facts from which it can reasonably be inferred that this 'something' was knowable and that the defendants were in a position to know it."[153] "Delaware law provides that 'intent can be inferred from circumstantial evidence.'"[154]

The Court notes that there is circumstantial evidence possibly showing that Allergan had knowledge that it falsely represented that SERI had minimal adverse events. For instance, as noted above, the SERI study reports made statements either (i) to the effect that SERI was safe (in the SURE-002 study report), or (ii) that a study was halted due to insufficient enrollment (in

[149] *Id.*, Ex. 28.
[150] Defs.' Mot. for Summ. J. at 12, Ex. 22 at Tr. 171:18-172:4.
[151] *Id.* at 13, Ex. 30 (listing the complaints and adverse events).
[152] Pls.' Answering Br. at 18, Ex. 49 (laying out the personal meeting notes of a Sofregen representative).
[153] *Abry P'rs V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).
[154] *ITW Glob. Invs. Inc.*, 2017 WL 1040711, at * 8 (quoting *Goldsborough v. 397 Props., LLC*, 2000 WL 33110878, at *2 (Del. Super. Sept. 29, 2000)).

the SURE-006 study report). However, discovery has revealed that the explantation rate in SURE-002 could be found to be dangerous, not safe, and that an Allergan official noted in an email that SURE-006 was halted due to adverse events. Though these studies were completed before execution of the APA, Allergan did not share them with Sofregen until after the APA was executed. In addition, an internal Allergan email dated January 26, 2016, stated with respect to SURE-002 that "[Allergan is] inclined to wait a couple of weeks before going any further with [SURE-002] – we'd like to wait and see the results of business development."[155] "This evidence could prompt a factfinder to conclude that [Allergan] was involved in a pattern of deception, and/or that [Allergan] had knowledge of the misrepresentations" made to Sofregen.[156] Thus, the Court finds there are genuine issues of material fact that must be determined by the factfinder.

Allergan has not carried its burden on the third element. Allergan has not shown that the material facts lead only to the conclusion that Allergan had no intent to use potential material misrepresentations of fact to induce Sofregen to acquire SERI. The opposite may be true. For instance, the January 26, 2016, email directly above, and the fact that Allergan waited to share the SURE studies until after the APA was executed could be viewed by a factfinder as misrepresentations made with the intent to induce Sofregen to acquire SERI. Put another way, "[t]here would be no other reason for the material misrepresentations other than to induce [Sofregen] to purchase [SERI]."[157]

In addition, Allergan has not carried its burden of showing that Sofregen cannot show justifiable reliance—*i.e.*, the fourth element. "Under Delaware law, justifiable reliance is measured objectively and requires that the representations relied upon involve matters which a

[155] Pls.' Answering Br., Ex. 53.
[156] *See ITW Glob. Invs. Inc.*, 2017 WL 1040711, at *9.
[157] *See In re Bracket Hldg. Corp. Litig.*, 2017 WL 3283169, at *10 (Del. Super. July 31, 2017).

reasonable person would consider important in determining his course of action."[158] "When sophisticated parties contractually disclaim reliance upon representations not included within the four corners of the written agreement, fraud claims based on those representations are barred because any purported reliance upon them is unreasonable as a matter of law."[159]

The Court notes that the record shows Allergan disclosed some information about SERI products (the SURE-001 study and the list of 2,000 complaints), but it did not disclose the negative SURE-002 and SURE-006 studies prior to the APA execution. From the perspective of a reasonable person, these studies would be important[160] in determining whether the multiple adverse events from the studies would have influenced Sofregen's decision to acquire SERI. Sofregen, however, did not get the benefit of examining those studies. Instead, Sofregen could have justifiably relied on the information Allergan provided pre-APA execution. Sofregen therefore could have justifiably relied on Allergan's representations, unless it is found that the parties disclaimed reliance on extracontractual representations.[161] As such, Allergan has not displayed that the material facts show only that Sofregen could not have justifiably relied.

Allergan has not shown that Sofregen has not been damaged because of its reliance as it needs on the fifth element. Common sense dictates that if fraudulent inducement is found, then Sofregen was damaged when it paid for SERI. In the Motion to Dismiss Opinion, it was noted that the Count III damages might be bootstrapped to the Counts I and II damages.[162] However, as it stands now, the Count II damages go to the failure to deliver all SERI products,[163] whereas

[158] *Trascent Mgmt. Consulting, LLC v. Bouri*, 2018 WL 4293359, at *17 (Del. Ch. Sept. 10, 2018) (internal quotation marks and citations omitted).
[159] *St. James Recreation, LLC v. Rieger Opportunity P'rs, LLC*, 2003 WL 22659875, at *3 (Del. Ch. Nov. 5, 2003).
[160] *See Trascent Mgmt. Consulting, LLC*, 2018 WL 4293359, at *17.
[161] *See St. James Recreation, LLC*, 2003 WL 22659875, at *3.
[162] *See* Opinion at 11-13.
[163] *See* Second Am. Compl. ¶¶ 61-65; Pls.' Answering Br. at 43-47 (discussing Count II).

the fraudulent inducement damages go to the payment by Sofregen to acquire SERI.[164] These damages appear distinct, and Count III does not appear to be bootstrapped. In other words, the "fraud claim pled contemporaneously with a breach of contract claim may nonetheless survive 'so long as the claim is based on conduct that is separate and distinct' from the alleged breach of contract,"[165] which appears to be the case here.

2. The APA does not bar Count III

Allergan argues that the Court should reconsider its Motion to Dismiss Opinion "because Sofregen has dismissed Count I for breach of representations and warranties and stipulated that Sofregen" will no longer rely on Section 3.5.[166] Allergan maintains that the Court's reliance on *Wind Point Partners VII-A, L.P. v. Insight Equity A.P.X. Co., LLC* no longer applies.[167] Sofregen counters that the dismissal of Count I does not constitute a changed circumstance permitting reconsideration because the fraud claim has never been predicated on Section 3.5.[168]

The first issue to decide is whether the dismissal of Count I constitutes a "changed circumstance" for the fraudulent inducement claim.[169] If yes, the second issue is whether the changed circumstance now bars Count III.

The "law of the case" is a "judicially-created doctrine that prevents parties from relitigating issue[s] that previously have been decided."[170] The law of the case will "not be disturbed . . . unless a compelling reasons to do so appears."[171] "A party seeking to have the

[164] *See* Second Am. Compl. ¶¶ 66-73.
[165] *See* Opinion at 11 (quoting *ITW Glob. Invs. Inc. v. Am. Indus. P'rs Cap. Fund IV, L.P.*, 2015 WL 3970908, at *6 (Del. Super. June 24, 2015)).
[166] Defs.' Mot. for Summ. J. at 31.
[167] *Id.* at 31-32.
[168] Pls.' Answering Br. at 42.
[169] *See Emmons v. Tri Supply & Equip., Inc.*, 2013 WL 4829272, at *4 (Del. Super. July 29, 2013) (stating that a prior decision may be reconsidered if it is "clearly wrong, produces an injustice or . . . because of changed circumstances"); *see also Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000).
[170] *Zurich Am. Ins. Co. v. Syngenta Crop Prot. LLC*, 2022 WL 4091260, at *3 (Del. Super. Aug. 24, 2022).
[171] *Id.*; *see also Zirn v. VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch. Sept. 23, 1994).

Court reconsider the earlier ruling must demonstrate newly discovered evidence, a change of law, or manifest injustice."[172]

Allergan's one argument is that there is a changed circumstance by way of stipulation to dismiss Count I (breach of representations and warranties). The Court notes that this does not fit squarely into "newly discovered evidence," a "change in law," or a "manifest injustice." Rather, Allergan argues that the dismissal of Count I is a changed circumstance because "all that remains [with respect to the fraud claim] are the extra-contractual representations that Sofregen . . . expressly disclaimed."[173] Allergan is referring to the Motion to Dismiss Opinion, where the Court found that APA Sections 4.5(b) and 6.7, together, create an anti-reliance provision.[174] However, the Court ultimately held that "APA Sections 4.5(b) and 6.7 do not disclaim fraud by concealment, and therefore, do not preclude Sofregen's fraudulent inducement claim."[175] The Court has reviewed APA Section 3.5 and notes that Sofregen's fraudulent inducement claim does not rest on that Section.[176] As such, the stipulation does not constitute a changed circumstance.

APA Section 4.5(b) states that Allergan has not made any representation or warranty as to the accuracy or completeness of any information, and that Sofregen cannot rely on the same.[177] Allergan's argument misses the point. There is a genuine issue of material fact over whether the alleged fraud here could be viewed as either active concealment or a material omission. In other words, a factfinder could conclude that Allergan concealed the SURE-002 and SURE-006 studies, or that Allergan omitted this information. Allergan, in its Reply, construes the Motion to Dismiss Opinion to hold that Sofregen could only succeed on its

[172] *Zurich Am. Ins. Co.*, 2022 WL 4091260, at *3; *E.I. du Pont Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. Super. 1995).
[173] Defs.' Mot. for Summ. J. at 32-33.
[174] Opinion at 10-11.
[175] *Id.* at 11.
[176] *See* Defs.' Mot. for Summ. J., Ex. 37 § 3.5.
[177] *See id.*, Ex. 37 § 4.5(b).

fraudulent inducement claim if Allergan engaged in "active concealment of material information in a manner that precluded Sofregen from discovering that information."[178]

Allergan has the burden to prove that a factfinder could not reasonably conclude that Allergan actively concealed the SURE studies.[179] The record does not support that conclusion. For instance, before a February 2, 2016, meeting, Sofregen mentioned a request to cover "recent clinical or animal studies."[180] The SURE studies were not discussed or provided to Sofregen.[181] Further, on July 8, 2016, Sofregen's CSO requested that Allergan provide "information of any on-going sponsored clinical studies."[182] The SURE studies were not provided.[183] Together, a genuine issue of material fact exists over whether Allergan actively concealed material information from Sofregen. At the very least, if active concealment is found, then by Allergan's own admission the APA does not bar the fraudulent inducement claim.[184]

Accordingly, the Court finds that Allergan has not carried its burden with respect to the argument that the APA now precludes the fraudulent inducement clam.

B. COUNT II (BREACH OF APA SECTIONS 2.2 AND 2.5)

To state a claim for breach of contract, a party must show: "(1) a contractual obligation; (2) breach of that obligation; and (3) damages caused by the defendant's breach."[185]

[178] Defs.' Reply. Br. at 7 (citing Opinion at 11).
[179] *See In re Asbestos Litig.*, 1994 WL 7211774, at *2 (Del. Super. Nov. 4, 1994) ("On a motion for summary judgment, the movant bears the initial burden of 'showing' an absence of a genuine issue for trial." (internal citation omitted)). In other words, the movant must show "there is an absence of evidence to support the non-moving party's case." *Id.* Here, as noted by the facts above, there is a genuine issue for trial.
[180] Pls.' Answering Br. at 15, Ex. 41.
[181] *Id.* at 16.
[182] *Id.* at 17, Ex. 45.
[183] *Id.* at 17.
[184] *See* Defs.' Reply Br. at 7 ("The only narrow basis for fraud left open [by the Motion to Dismiss Opinion] was based on Allergan allegedly engaging in active concealment of material information in a manner that precluded Sofregen from discovering that information.").
[185] *1 Oak Priv. Equity Venture Cap. Ltd. v. Twitter, Inc.*, 2015 WL 7776758, at *4 (Del. Super. Nov. 20, 2015).

Sofregen claims that Allergan breached APA Sections 2.2 and 2.5 because Allergan did not deliver to Sofregen all 15,767 units of "Finished Product Inventory" listed in Schedule 2.2(a)(iv)(A) within thirty days of closing.[186] Allergan argues that Section 2.5(e) required Allergan to transfer to Sofregen all Finished Product Inventory in Allergan's "possession or control" as of November 10, 2016,[187] and that Allergan made no representations regarding the specific number of SERI units it would transfer.[188] Sofregen counters that the "possession or control" language of Section 2.5(e) goes to product inventory that is separate from "Finished Product Inventory" in Schedule 2.2(a)(iv),[189] and that Schedule 2.2(a)(iv) shows that Allergan represented the number of SERI units it would transfer to Sofregen.[190]

The Court find that Allergan's argument that it only had to transfer the product inventory in its "possession and control," as defined by Section 2.5(e), is not a reasonable interpretation of the APA. This Section states that within thirty days of the Effective Date, "[Allergan] shall ship to [Sofregen] . . ., any *other* Product Inventory in [Allergan's or its affiliates'] *possession or control*."[191] "Product Inventory" is defined as "Finished Product Inventory," "Spools," and packaging materials.[192] "Finished Product Inventory" is defined as the inventory set forth on Schedule 2.2(a)(iv)(A), which inventory totals 15,767 units.[193] The key language in Section 2.5(e) is the word "other." The Court believes a reasonable reading of this Section is that "other Product Inventory" means items in addition to Finished Product Inventory. As such, Allergan

[186] *See* Pls.' Answering Br. at 44.
[187] Defs.' Mot. for Summ. J. at 41; *see also id.*, Ex. 37, § 2.5(e).
[188] *Id.* at 41.
[189] Pls.' Answering Br. at 45.
[190] *Id.* at 44.
[191] *See* Defs.' Mot. for Summ. J., Ex. 37 § 2.5(e).
[192] *See id.*, Ex. 37 § 2.2(a)(iv)(A) (emphasis added).
[193] *See id.*, Ex. 37 § 2.2(a)(iv)(A), Ex. 38 at Schedule 2.2(a)(iv)(A).

does not prevail on this "possession and control" argument because Section 2.5(e) must be read in context.[194]

The Court finds it less clear whether Allergan made representations or warranties regarding the number of SERI units it would transfer to Sofregen. Section 2.2(a)(iv)(A) defines "Finished Product Inventory," and references Schedule 2.2(a)(iv)(A) for the number of units.[195] The issue with Section 2.2 is that it does not read as a clause that requires Allergan to do anything, *i.e.*, there are no action verbs in the clause.[196] Rather, Section 2.2 defines "Acquired Assets" and other terms. Thus, the next step is to look to Section 2.5.

Section 2.5 is titled "Transfer of Assets; Risk of Loss; Further Assurances." The only refence to "Product Inventory" is in Section 2.5(e), which is laid out above. However, Section 2.5(g) states that "[o]n the Effective Date, title to the Acquired Assets shall be transferred to [Sofregen] and from and after the Effective Date, . . . [Sofregen] shall bear all risk of loss or damage associate with the Acquired Assets, wherever located."[197] While "Acquired Assets" includes the "Finished Product Inventory," the provision here does not seem clear. In other words, for Count II, Sections 2.2 and 2.5 appear ambiguous.

"When a contract is clear and unambiguous, the court will give effect to the plain-meaning of the contract's terms and provisions."[198] But when a contract is subject to multiple interpretations, the contract is ambiguous.[199]

Here, Allergan's interpretation is that the noted Sections provide no representations and warranties for Allergan to deliver every SERI product unit on Schedule 2.2(a)(iv)(A).

---

[194] *See Sarraf 2018 Fam. Tr. v. RP Holdco, LLC*, 2022 WL 10093538, at *8 (Del. Super. Oct. 17, 2022) ("The Court must construe [a contract] as a whole, giving effect to all provisions therein." (internal quotations omitted)).
[195] *See* Defs.' Mot. for Summ. J., Ex. 37 § 2.2(a)(iv)(A).
[196] *See id.*, Ex. 37 § 2.2.
[197] *Id.*, Ex. 37 § 2.5(g).
[198] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010).
[199] *Id.* at 1160.

Sofregen's interpretation is that Allergan was obligated to turn over all SERI product inventory in Schedule 2.2(a)(iv)(A) within thirty days of closing. Looking solely within the four corners of the document, it cannot be determined that either party is conclusively correct. When a contract is ambiguous, that "rais[es] factual issues requiring consideration of extrinsic evidence to determine the intended meaning of the provision[s] in light of the expectations of the contracting parties."[200] Here, the parties both focus on the number of missing units and where those units could be. They do not cite to helpful extrinsic evidence in their briefs. Nonetheless, it is Allergan's burden to carry, and Allergan's argument that it was not required to deliver all listed SERI product units is not persuasive.

The Court will **DENY** summary judgment on Count II.

C. COUNTERCLAIM I (DECLARATORY JUDGMENT)

Allergan is seeking a declaration, pursuant to APA Section 2.3 and 5.7, that

> Sofregen assumed all liabilities and obligations relating to Previously Sold Products, and that Allergan is not responsible for reimbursing Sofregen for any damages or costs associated with warranty claims and product liability unless and until there is a final and non-appealable holding that Sofregen was liable for damages resulting, in whole or in part, from a Non-Conforming Product and, even then, only if Sofregen has satisfied the conditions precedent in Section 5.7(ii).[201]

Sofregen argues that the plain language of the APA shows that Sofregen "did not assume any liability for SERI *implanted* prior to the execution of the APA, only SERI *sold* prior to the APA that is implanted after."[202] Sofregen contends that is the correct interpretation because APA Section 2.3(a)(iii) contains the language, "arising after the Effective Date."[203]

---

[200] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1229 (Del. 1997).
[201] Defs.' Mot. for Summ. J. at 45; *see also* Defs.' Countercls. ¶ 108.
[202] Pls.' Answering Br. at 48.
[203] *Id.* at 47.

Delaware's Declaratory Judgment Act[204] "provides a means for securing judicial relief in an expeditious and comprehensive manner."[205] The Act permits the Court to construe a contract and provide to a party a declaration of rights thereunder.[206] To consider a controversy suitable for declaratory judgment: "1) the controversy must involve a claim of right or other legal interest of the party seeking declaratory relief; 2) the [claim] must be asserted against" a party with "an interest in contesting the claim; 3) the conflicting interests must be real and adverse; and 4) the issue must be ripe for judicial determination."[207]

Here, all the above elements are met. Sofregen does not argue to the contrary. First, Allergan has a legal interest in seeking declaratory relief under the APA. Second, the claim is asserted against Sofregen, who has an interest in contesting the claim. Third, the interests are real and adverse because they essentially relate to which party bears responsibility for certain SERI complaints and lawsuits. Finally, the issue is ripe for determination because a number of SERI-related lawsuits already exist. The next issue is whether Allergan is entitled to summary judgment on Counterclaim I.

APA Section 2.3(a)(iii), titled "Assumption of Liabilities" states:

> (a) As of the Effective Date, [Sofregen] shall assume and pay, discharge, perform or otherwise satisfy the following liabilities and obligations of every kind and nature, whether known or unknown, express or implied, primary or secondary, direct or indirect, absolute, accrued, contingent or otherwise and whether due or to become due, of [Allergan's] arising out of, relating to or otherwise in respect of the Acquired Assets and/or the Business (the "Assumed Liabilities"): . . . (iii) subject to any applicable reimbursement obligations of [Allergan] in Section 5.7, (A) all liabilities and obligations for warranty claims, complaints and product liability, and the other liabilities assumed by [Sofregen] pursuant to Section 5.7, including all Actions relating to any such liabilities, and (B) all liabilities and obligations for refunds, adjustments, allowances, repairs, exchanges, recalls and returns or similar

[204] 10 *Del. C.* § 6502.
[205] *Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 439 (Del. Super. 2002). "The Act is entitled to liberal application." *Id.* (citing *Stabler v. Ramsay*, 89 A.2d 544 (Del. 1952)).
[206] *See* 10 *Del. C.* § 6502.
[207] *Weiner*, 793 A.2d at 439 (citing *Rollins Int'l Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973)).

> claims, arising out of or relating to the Seri Product, arising after the Effective Date, whether relating to any Seri Product sold prior to, on or after the Effective Date.[208]

APA Section 5.7(a)(ii), titled "Product Responsibility" states:

> (a) From and after the Effective Date: . . . (ii) Without limiting the foregoing, (A) [Sofregen] shall promptly notify [Allergan] of any complaints, requests, investigations, reports or pending or threatened Action with respect to any Previously Sold Product; (B) [Sofregen] shall regularly consult in advance with [Allergan] on all material actions to be taken relating to such complaints, requests, investigations, reports or Actions relating to any Previously Sold Product; (C) [Sofregen] shall in good faith incorporate into its response(s) to any such complaints, requests, investigations, reports or Actions any input of [Allergan] on such matters; and (D) [Allergan] shall be entitled to participate, at its cost, in any Action related thereto. . . . [Sofregen] shall be financially responsible for all such actions required to be taken by it under clause (ii); provided, that if (1) any such complaint, request or investigation shall result in an Action relating to Previously Sold Product, (2) [Sofregen] has complied with the foregoing terms of this Section 5.7(a)(ii), and (3) the final and non-appealable holding in such Action is that [Sofregen] is liable for damages resulting, in whole or in part, from Non-Conforming Product . . . then [Allergan] shall be responsible for its *pro rata* share . . . of the reasonable out-of-pocket costs and expenses actually incurred by [Sofregen] in connection with such Action, including damages required to be paid by [Sofregen] relating thereto but solely to the extent that such reasonable out-of-pocket costs and expenses and other Losses are attributable to the use, sale, manufacture or distribution of Non-Conforming Product.[209]

"Previously Sold Product" is defined as "any SeriScaffold sold and distributed in interstate commerce by [Allergan] or any of its Affiliates prior to the Effective Date."[210] "Non-Conforming Product" is defined as:

> [A]ny SeriScaffold sold and distributed in interstate commerce by [Allergan] or its Affiliates prior to the Effective Date, the manufacture of which failed to conform in all material respects to the Laws then applicable to the manufacture of SeriScaffold, . . . as finally determined (i) [in writing by the parties], (ii) [final judgment of a court], or (iii) [any of means the parties agree to].[211]

[208] Defs.' Mot. for Summ. J., Ex. 37 § 2.3(a)(iii).
[209] *Id.*, Ex. 37 § 5.7(a)(ii).
[210] *Id.*, Ex. 37 § 1.1.
[211] *Id.*

Allergan argues that "Section 2.3(a)(iii) consists of a sub-part (A) and (B) and the former does not include the 'arising after the Effective Date' language."[212] Section 2.3(a)(iii) is subject to only one reasonable interpretation, and Allergan's interpretation is not reasonable. The only reasonable interpretation of Section 2.3(a)(iii) is to read the "arising after the Effective Date" language as relating to both sub-part (A) and (B). To read sub-part (A) without this limiting language would render other liability provisions meaningless because it would operate as a general liability clause. Such a construction is inconsistent with the way Sections 2.3(a)(i)-(ii) are drafted.[213] Further, the plain language of APA Section 5.7(a) states that Sofregen is financially responsible for Previously Sold Products "[f]rom and after the Effective Date," not generally as Allergan argues.[214]

Therefore, Section 2.3(a)(iii) is subject to only one reasonable interpretation, and that interpretation is inconsistent with Allergan's interpretation underlying its requested declaration. For this reason, Allergan's request for summary judgment on Counterclaim I is **DENIED**.

D. COUNTERCLAIM II (BREACH OF APA SECTIONS 2.3 AND 5.7)

To state a claim for breach of contract, the plaintiff must show: "(1) a contractual obligation; (2) breach of that obligation; and (3) damages caused by the defendant's breach."[215]

Allergan argues that Sofregen breached APA Sections 2.3 and 5.7 because Sofregen failed "to assume liability for and conduct the defense of certain product liability lawsuits and,

[212] Def.s.'Reply Br. at 22 (quoting Defs.' Mot. for Summ. J., Ex. 37 § 2.3(a)(iii)).
[213] *See* Defs.' Mot. for Summ. J., Ex. 37 § 2.3(a)(i) (including the language "all liabilities and obligations arising out of, relating to or otherwise in respect of the Acquired Assets and/or Business on or after, or in respect of periods following, the Effective Date"); *id.*, Ex. 37 § 2.3(a)(ii) (including the language "all liabilities and obligations of the applicable Seller Party under the Product Contracts, the Registrations and the Product Permits, in each case, that are transferred to Buyer hereunder, to be performed or accruing on or after, or in respect of periods following, the Effective Date").
[214] *See id.*, Ex. 37 § 5.7(a).
[215] *1 Oak Priv. Equity Venture Cap. Ltd.*, 2015 WL 7776758, at *4.

under Section 5.7, to consult Allergan on all material actions taken in those lawsuits."[216] Allergan further alleges that there are "at least four actions" in which Sofregen breached its obligations, but Allergan only discusses one—the Harben Action in the Eastern District of Pennsylvania.[217] Sofregen counters that "[o]ther than conclusory citations to its counterclaims, Allergan does not offer any evidence that Sofregen did not regularly consult with [Allergan] with regards to the Harben Action."[218] Moreover, Sofregen claims it consulted with Allergan in the Harben Action, and that Allergan has failed to carry its burden.[219]

Allergan offers no material evidence to persuade the Court that it should be entitled to summary judgment on Counterclaim II. Allergan cites to: (1) APA Sections 2.3 and 5.7; (2) Allegan's own Counterclaims; and (3) Harben Action documents, including (a) the notice of removal from Pennsylvania state court to the Eastern District of Pennsylvania, (b) Ms. Harben's complaint, (c) a certification in support of removal from an Allergan "assistant secretary," and (d) a PDF docket of the Harben Action.

Allergan believes the Court need not look further than Sofregen's motion to dismiss in the Harben Action.[220] Allergan tells the Court that it can take judicial notice of pleadings, but it does not provide Sofregen's motion to dismiss as an exhibit. Allergan states only that, in Sofregen's motion to dismiss, Sofregen argued that it "did not assume liabilities and obligations for warranty claims and product liability for Previously Sold Products upon acquiring SERI from Allergan," and that Sofregen was not liable for Ms. Harben's injuries because she did not allege

[216] Defs.' Mot. for Summ. J. at 49; *see also* Defs.' Countercls. ¶¶ 109-115.
[217] *See* Defs.' Mot. for Summ. J. at 49-51.
[218] Pls.' Answering Br. at 49.
[219] *See id.*
[220] Defs.' Reply Br. at 23.

that Sofregen "expressly or impliedly agreed to assume liability for SERI" that was made or sold before the execution of the APA.[221]

The Court has no way to know if Allergan's assertions with respect to the Harben Action are even true because Allergan has failed to produce evidence to back up these assertions. Moreover, Sofregen disputes Allergan's representations of the Harben Action and cites to deposition testimony of Mr. Weisman, Sofregen's Co-Founder and then-CEO, who testified that he remembered legal bills that covered communications between Sofregen's and Allergan's counsel regarding Sofregen's motion to dismiss in the Harben Action.[222]

There is, at least, a genuine issue of material fact as to whether Sofregen consulted with Allergan regarding the motion to dismiss Sofregen in the Harben Action. Therefore, summary judgment for Counterclaim II is **DENIED**.

E. COUNTERCLAIM III (BREACH OF APA SECTION 2.8)

Allergan asks the Court to grant summary judgment on Counterclaim III, breach of APA Section 2.8, for Sofregen's failure to pay "Earn-Out Payments" owed from Q4 2017 through present.[223] Sofregen admits that it did not pay the Q4 2017 Earn-Out Payment, but Sofregen argues that it withheld the payments because (1) Allergan breached the APA in failing to deliver all SERI units within thirty days of closing, and (2) Allergan fraudulently induced Sofregen to enter into the APA.[224] Allergan counters that it is entitled to summary judgment on Sofregen's breach of the APA claim and the fraudulent inducement claim.[225] As such, Allergan argues,

[221] *See* Defs.' Mot. for Summ. J. at 49-50; Defs.' Countercls. ¶¶ 79-85.
[222] *See* Pls.' Answering Br., Ex. 91 at Tr. 360:4-363:17.
[223] *See* Defs.' Mot. for Summ. J. at 51.
[224] *See* Pls.' Answering Br. at 50.
[225] Defs.' Reply Br. at 25.

Sofregen's allegations cannot save it from summary judgment with respect to this Counterclaim III.[226]

Because the Court denies summary judgment for Allergan with respect to Count II (breach of APA Sections 2.2 and 2.5) and Count III (fraudulent inducement), the Court must deny summary on Counterclaim III. "A party is excused from performance under a contract if the other party is in material breach thereof."[227] Moreover, [i]f a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."[228]

Here, Allergan essentially contends that summary judgment on Counterclaim III is proper because Allergan is entitled to summary judgment on Sofregen's claims, and thus, Sofregen has no defenses for nonperformance.[229] As discussed above, the Court has found that Allergan has not carried its burden with respect to Sofregen's claims. Thus, Sofregen's defenses that it is excused from performance because Allergan breached the APA, and/or Allergan fraudulently induced Sofregen to enter into the APA, remain viable. There is no dispute that Sofregen did not perform.[230] Sofregen failed to pay Earn-Out Payments. However, Sofregen, at this stage, has viable excuses for nonperformance.[231]

Therefore, Allergan has failed to carry its burden, and summary judgment with respect to Counterclaim III is **DENIED**.

---

[226] *See id.*
[227] *In re Mobilactive Media, LLC*, 2013 WL 297950, at *13 (Del. Ch. Jan. 25, 2013) (citation omitted). *In re Mobilactive Media* also asserts that a slight breach does not necessarily terminate the obligations of the injured party under a contract. *See id.* Here, while Count II (breach of APA Sections 2.2 and 2.5) *could* constitute a slight breach, the fraudulent inducement claim's survival permits Sofregen's excuse of performance.
[228] *Lynch v. Gonzalez*, 2020 WL 4381604, at *35 (Del. Ch. July 31, 2020) (citation omitted).
[229] *See* Defs.' Reply Br. at 25.
[230] *See* Pls.' Answering Br. at 50.
[231] *See In re Mobilactive Media*, 2013 WL 297950, at *13; *Lynch*, 2020 WL 4381604, at *35.

VI. CONCLUSION

With respect to Sofregen's claims (Count II: breach of APA Sections 2.2 and 2.5; and Count III: fraudulent inducement), there are genuine disputes of material fact, and Allergan has failed to carry its burden that it is entitled to judgment as a matter of law. As such, the Motion on Count II and Count III is **DENIED**.

With respect to Allergan's counterclaims (Counterclaim I: declaratory judgment; Counterclaim II: breach of APA Sections 2.3 and 5.7; and Counterclaim III: breach of APA Section 2.8), there are either genuine disputes of material fact, or Allergan has failed to show that Sofregen has no viable defenses to its alleged breaches. Allergan has failed to carry its burden that it is entitled to judgment as a matter of law on its counterclaims. As such, Allergan's Motion on Counterclaim I, Counterclaim II, and Counterclaim III is **DENIED**.

IT IS SO ORDERED.

February 3, 2023
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge